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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CNA FINANCIAL CORPORATION,
CONTINENTAL ASSURANCE COMPANY,
and CONTINENTAL CASUALTY COMPANY,
Petitioners,

v.

SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR and DIRECTOR OF THE OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS OF THE UNITED STATES DEPARTMENT OF LABOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The Equal Employment Advisory Council respectfully submits this brief as amicus curiae in support of the petition for a writ of certiorari in this case. This brief is being submitted with the written consent of the parties, pursuant to Supreme Court Rule 36. The letters of consent have been filed with the Clerk of the Court.

INTEREST OF THE AMICUS CURIAE

The Equal Employment Advisory Council is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including individual employers as well as national trade and industry associations, which themselves have hundreds of employer members with a common interest in the foregoing purposes. The Council's governing body is a board of directors composed primarily of experts and specialists in labor relations and equal opportunity, whose combined experience gives the council a unique competence and understanding of the practical and legal aspects of pertinent government regulations. The members of the Council are committed to the principles of nondiscrimination and equal employment opportunity.

Substantially all of the Council's members, or their constituents, are employers and government contractors subject to the provisions of Presidential Executive Order 11246, 30 Fed. Reg. 12319 (1965), as amended. As such, they have a direct interest in the manner in which the government protects, or fails to protect, the confidentiality of the substantial volume of commercially-sensitive business information that is submitted to the government in connection with the Executive Order program. Thus, the members of the Council have a particular interest in the issues presented for the Court's consideration in this case.

The Council is particularly familiar with the issues and the long procedural history of the instant case, having participated as amicus curiae in the District of Columbia Circuit. In addition, because of its interest in issues pertaining to confidential business information, the Council has sought and has been granted permission

to participate as amicus curiae in numerous cases in this Court and in the courts of appeals. These cases have included *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), and several others which, similar to the instant case, involved no question of an employer's compliance with equal employment opportunity requirements, but rather raised issues concerning the public disclosure of confidential business information that was provided to a government agency.

STATEMENT OF THE CASE

This case has its origin in a Freedom of Information Act request filed with the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP). The request sought the disclosure of copies of affirmative action programs prepared by Petitioner CNA Financial Corporation, a government contractor, and copies of CNA's federal EEO-1 reports showing all of the company's employees, categorized by race, sex, and occupational group. The requested information had been submitted to the OFCCP in accord with that agency's procedures for enforcing the nondiscrimination and affirmative action requirements applied to government contractors by Executive Order 11246.

Petitioner CNA opposed the disclosure of this information because of the competitive harm that would result. Specifically, CNA asserted that such disclosure would, among other things, reveal to competitors CNA's plans to enter, expand, or contract different markets and product lines, and would also facilitate competitors' attempts to raid CNA's employees, with a resulting increase in recruiting and training costs for CNA.

CNA's objections to disclosure were based upon Exemptions 3 and 4 of the Freedom of Information Act. CNA argued that the threat of substantial competitive harm meant that the requested material was within the protection provided by Exemption 4 which excludes from mandatory disclosure "trade secrets and commercial or

financial information obtained from a person and privileged or confidential." 5 U.S.C. § 552 (b) (4) (1982). In addition, CNA argued that the requested information was covered by the prohibition on disclosure found in Section 1905 of the Trade Secrets Act, and that the Trade Secrets Act is a withholding statute within the meaning of Exemption 3 of the FOIA, 5 U.S.C. § 522(b) (3) (1982).

CNA requested that it be granted a hearing on this matter before the agency, but the agency refused and the final decision was made without the benefit of a hearing on CNA's objections to disclosure. In attempting to resolve the question of competitive harm, OFCCP consulted an outside expert to advise the agency on whether such harm could result from disclosure. The agency rejected CNA's opposition to disclosure and ordered release of the data. CNA then sought relief in federal district court, which sustained the agency's determination without affording CNA a hearing in which to cross-examine the agency's expert or attempt to rebut the report on which the agency had based its critical finding that release of the data would not result in competitive harm to CNA.

On appeal, the District of Columbia Circuit denied CNA's arguments that the agency proceedings had been flawed by the agency's refusal to provide a copy of the outside expert's report to CNA. The Court of Appeals also ruled that CNA was not entitled to have de novo review of the competitive harm issue in federal court, and indicated that absent a showing that there was a serious inadequacy in the agency's factfinding procedures, the court's review would be limited to a review of the agency record. The Court of Appeals thus upheld the agency's decision to release the information.

SUMMARY OF REASONS FOR GRANTING THE WRIT

This case presents serious questions about the basic fairness of procedures which allow a contractor's confidential business information to be disclosed by the Department of Labor—over the objections of the contractor—without the benefit of a hearing either before the agency or in federal court to resolve material, disputed issues of fact. The decision of the Court of Appeals, by endorsing such a procedure, contradicts established principles of procedural fairness and therefore is appropriate for review by this Court.

In addition to the procedural due process issues raised by the cumulative impact of the denial of a hearing in either the administrative or judicial phases of this matter, the case presents for review a series of important unresolved issues related to so-called "reverse FOIA" litigation in which a government contractor seeks to protect the confidentiality of sensitive business information which has been submitted to the government. These issues include questions about the relationship of Section 1905 of the Trade Secrets Act and Exemptions 3 and 4 of the Freedom of Information Act and the question of when de novo review of an agency's decision to disclose confidential business information is appropriate.

There has been general uncertainty about these issues since they were left unanswered by this Court's decision in *Chrysler Corporation v. Brown*, 441 U.S. 281 (1979). The ruling by the Court of Appeals in this case demonstrates that the lower courts have been unable to produce consistent, practical answers to these questions, and thus review by this Court is essential to provide guidance on these issues.

REASONS FOR GRANTING THE WRIT

I. REVIEW BY THIS COURT IS NECESSARY BECAUSE THE LOWER COURT'S DECISION ENDORSES A PROCEDURE WHICH OFFENDS BASIC NOTIONS OF FAIRNESS BY ALLOWING DISCLOSURE OF PETITIONERS' CONFIDENTIAL BUSINESS INFORMATION OVER THE OBJECTIONS OF THE PETITIONERS WITHOUT GIVING PETITIONERS ANY OPPORTUNITY FOR A HEARING, EITHER BEFORE THE AGENCY OR IN THE DISTRICT COURT.

This action involves a Freedom of Information Act request filed with the Department of Labor seeking disclosure of certain information which the Petitioners (CNA) had submitted to that agency. Petitioners objected to such disclosure and advised the agency that the information at issue is considered by Petitioners to be sensitive and confidential business information which could cause the Petitioners significant competitive harm if disclosed. The agency decided to disclose the information over the Petitioners' objections.

Given the nature of Petitioners' objections, it is remarkable that the agency made its decision without ever having given Petitioners an opportunity for a hearing, especially since the Petitioners' claim of competitive harm clearly raised material issues of fact, as evidenced by the agency's resort to an outside expert to help it resolve that claim. This flaw was compounded by the district court when it refused to conduct an evidentiary hearing and made its decision to support the agency simply on the basis of the agency's record. Thus, the Petitioners now face the prospect of having confidential business data disclosed to the public, including business competitors, without ever having been given the benefit of an evidentiary hearing.

This concern, that the overall procedure lacked any opportunity for a hearing, is a very serious one for government contractors generally. They are required to submit

significant amounts of business data to the Department of Labor, which enforces the nondiscrimination and affirmative action requirements of Executive Order 11246. Quite apart from its usefulness to monitor issues of equal opportunity related to the contractor's workforce, this data can provide competitors with a great deal of insight as to the confidential business plans of a company.

In assessing a contractor's objections to disclosure based on the potential of competitive harm, the agency is asked to make complex and very sophisticated judgments about issues in which it has no expertise. This factor makes litigation such as the instant case fundamentally different from many other types of administrative proceedings in which an agency is acting in an area where it has special technical knowledge. This distinction, combined with the importance of the interest a contractor has in maintaining the confidentiality of competitively-sensitive information, underscores the conclusion that basic notions of fairness require that the contractor be given an opportunity for a hearing at some point in the process.[1]

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[1] It is important at the outset to understand the nature of the information and data which is the subject of this lawsuit. Unlike a manufacturer's "secret formula", the importance of which is evident to even an uninformed observer, the necessary confidentiality of the vast amounts of data collected by OFCCP often requires special explanation to someone unfamiliar with the business operations involved. This same information, however, can be quite relevant to market and financial specialists and technicians who understand the industry. As noted by the Court of Appeals for the Fourth Circuit in *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1213 n.74 (1976), firms in highly competitive industries frequently employ specialists who continually search out fragments of information about competitors in this country and their operations. The court continued, quoting from an article printed at 9 Akron L. Rev. 673, 683-684 (1976):

> An additional reliable 'fragment' of information may be enough to bring the whole picture into much clearer focus and could conceivably mean the difference between success or failure in

As the discussion below indicates, there are sound reasons to conclude that the proceedings in this case at the Department of Labor were flawed and to suggest that de novo review by the district court was required in this case, particularly because disclosure hinged on a finding of fact that CNA vigorously disputed. But, the critical point is that unless the overall process contains *some* opportunity for an evidentiary hearing, disclosure of a contractor's confidential business information over the contractor's objections falls short of the basic fairness due in such a proceeding.

A. The Procedures Followed by the Department of Labor in this Matter Were Marked by Serious Inadequacies.

The Court of Appeals' opinion in this case by Judge Robinson, endorsing as adequate the procedures followed by the Department of Labor, stands in sharp contrast to Judge Robinson's earlier opinion criticizing precisely the same procedures by the same agency in *National Organization for Women (NOW) v. Social Security Administration*, 736 F.2d 727 (D.C. Cir. 1984). In his opinion in *NOW*, Judge Robinson pointed out that current case law provides "little guidance for determinations on whether agency factfinding procedures are adequate within the meaning of Section 10 of the APA, as interpreted by the Supreme Court." 736 F.2d at 738. Judge Robinson went on to offer a series of factors to be used in rationally analyzing the adequacy of agency procedures.

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certain contract bidding situations. The importance of a court's decision on disclosure in any given case is magnified by the fact that a number of jobs and possibly the future of the business may hinge on obtaining a given contract, depending on the industry involved and a number of other factors.

As discussed in note 5, *infra*, the data collected by OFCCP can be used by a competitor to determine significant information about a company's labor costs and profit margins.

First, he noted the fundamental precept that "interested parties must have an effective chance to respond to crucial facts." [2] He observed that this proposition is reflected in this Court's statement in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), that

> where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

In addition, Judge Robinson cited this Court's statement in *Bowman Transp. v. Arkansas-Best Freight Systems*, 419 U.S. 281, 288 (1974), that a "party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it." [3] Finally, Judge Robinson noted that the Department of Labor's procedures:

> confined the companies, in their efforts to establish just such a threat [of substantial competitive harm], to written specifications of reasons for confidential treatment. The companies put forward lengthy and detailed written statements in support of their position, only to learn in the end that overwhelmingly their efforts were unsuccessful. *Neither the agency's regulations nor its procedures offered the companies any guidance in focusing their presentations or documentation and, for much of the material implicated, the companies became aware of the agency's objections to their claims only after the agency's final decision to disclose.*

NOW, 736 F.2d at 740-741. (Emphasis added).

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[2] *National Organization for Women (NOW) v. Social Security Administration*, 736 F.2d at 727 (D.C. Cir. 1984), quoting *Carson Products Co. v. Califano*, 594 F.2d 453, 459 (5th Cir. 1979).

[3] *See NOW*, 736 F.2d at 739.

The logic and law behind Judge Robinson's carefully drafted criticism of these procedures is none the less valid because he adopted a different approach in the instant case without referring to his earlier-stated concerns. Rather, a comparison of the two opinions merely highlights how far the court below has drifted from the rulings of this Court in analyzing the adequacy of agency procedures.

The contradictions between the decision below and the rulings of this Court which Judge Robinson summarized in *NOW* indicate the importance of Supreme Court review in this case. By granting certiorari in the instant case, this Court would have an opportunity to offer much-needed guidance for such determinations.

B. The District of Columbia Circuit's Inappropriate Denial of De Novo Review in the Instant Case Demonstrates the Confused and Inconsistent State of the Law.

Notwithstanding the lack of an evidentiary hearing and the agency's refusal to reveal its secret expert's report, the Court of Appeals below ruled that de novo review in federal court was inappropriate. The Court of Appeals reached this conclusion by applying a standard which would permit de novo review only when the agency's own procedures were inadequate. In support, the court cited its own analysis in the concurring opinion in *NOW* wherein it interpreted rulings of this Court to mean that "procedures must be severely defective before a court proceeding under the APA can substitute de novo review for review of the agency's record." 736 F.2d at 745. The court of appeals suggested that substantial bias on the part of the agency would be such a severe defect.

There are several serious deficiencies in this analysis by the Court of Appeals. First, as pointed out above, the agency procedures in this case fall short of several commonly-accepted propositions of basic administrative

fairness, and thus were not adequate. Second, the District of Columbia Circuit's interpretation of the law as requiring that there can be de novo review only when there is a severe defect is not an accurate reading of this Court's decisions. Third, the District of Columbia Circuit's approach on this issue is inconsistent with the approach of the Fourth Circuit, which, in *General Motors Corp. v. Marshall*, 654 F.2d 294, 298-99 (1981), suggested that availability of de novo review depends on the complexity of the factual issues involved. The amicus believes that the view of the Fourth Circuit more accurately represents the sense of this Court's language in *Chrysler* on this issue. In any event, however, the conflicts between the two circuit courts indicates that this question is appropriate for review by this Court.[4]

It should be noted that the Circuit court decision in the instant case, as well as the concurring opinion in *NOW*, fail to appreciate the nature of the issue before the agency in a case involving the potential disclosure of confidential and sensitive business information. In such a case, the agency is being called upon to make judgments on matters in which it has no particular expertise. The primary issue involves how the information can be used by competitors and the ultimate competitive harm that can result from the disclosure. The agency making that judgment in this case is an agency with special expertise in issues of employment discrimination. Indeed, that was the purpose for which the information in question was provided to the agency. But, the issue

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[4] In seeking to adopt a new standard which would be consistent with *Chrysler*, the District of Columbia Circuit articulated a standard for de novo review which, in practical terms, can virtually never be met. That is, the concurring opinion in *NOW* contemplates that de novo review would be appropriate apparently only in the most extreme circumstances, such as where there is evidence of substantial bias in the agency procedures. See 736 F.2d at 745. Such a standard is not reasonable in reverse-FOIA cases, nor is such a standard an accurate reading of this Court's decision in *Chrysler*.

of potential harm resulting from disclosure is an issue entirely unrelated to employment discrimination.[5]

II. REVIEW IN THIS CASE WOULD PROVIDE A MUCH-NEEDED OPPORTUNITY FOR THIS COURT TO RESOLVE OTHER SERIOUS QUESTIONS LEFT UNANSWERED IN *CHRYSLER CORP. v. BROWN*.

In *Chrysler*, this Court left unresolved the relationship between § 1905 of the Trade Secrets Act and the Freedom of Information Act. In *Chrysler*, the Court specifically noted that it would "not here attempt to determine the relative ambits of Exemption 4 and § 1905, or to determine whether § 1905 is an exempting statute within the terms of the amended Exemption 3, ..." 441 U.S. 319 n.49. Both of these questions arise with frequency in reverse-FOIA litigation prompted by third party requests for the government to disclose confidential business information. The circuits have not been able to

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[5] The same information which allows the federal government to assess the equal opportunity profile of an employer's workforce reveals very different things to observers with different interests and backgrounds. For example, even the basic workforce analysis, which is but one part of the information collected by the OFCCP, can be used by a competitor to determine a company's labor costs and profit margins.

By using the data concerning the size and character of the company's workforce in conjunction with Bureau of Labor Statistics compilations of average labor rates for different job classifications in each locality, it is possible to calculate a company's expenditure on salaries within particular production facilities. Derivatively, such information also reveals the types and amount of expenditures which have been made on labor-saving machinery. By taking all of this information and combining it with the costs of materials, which are fairly standard throughout an industry, a company's cost structure and profit margin can be determined. In addition, future labor commitments can be determined from this data by studying where the on-the-job trainees have been concentrated over a period of years.

arrive at a consistent answer,[6] and thus this question, too, is one which the Court should now address.

III. REVIEW BY THIS COURT IS NECESSARY TO CLARIFY THE INTERPRETATION OF EXEMPTION 4 OF THE FREEDOM OF INFORMATION ACT.

The Court of Appeals affirmed the agency's conclusion that the information at issue is not protected from disclosure by Exemption 4 of the Freedom of Information Act. At the same time, however, the court acknowledged that the standard applied by the agency has been the subject of much criticism. An anlysis of the language of Exemption 4 and its legislative history suggests that this criticism is well-founded, and that this issue also warrants review by this Court.

Exemption 4 of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(4),[7] represents a straightforward Congressional judgment that the disclosure mandate of the FOIA should not apply to confidential business information which has been obtained by the government but which customarily would not be released to the

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[6] The relative scope of Section 1905 and Exemption 4 has been found to be the same in the Fourth Circuit, *Westinghouse Electric Corp. v. Schlesinger*, 542 F.2d 1190, 1204 n.38 (1976) and *General Motors Corp. v. Marshall*, 654 F.2d 294, 297 (1981). On the other hand, the Seventh Circuit has suggested that Section 1905 protects less information than Exemption 4, *General Electric Co. v. United States Nuclear Regulatory Commission*, 750 F.2d 1394, 1402 (1984), while this Court in *Chrysler* raised the theoretical possibility that Section 1905 covers information not protected by Exemption 4. See 441 U.S. at 319 n.49.

[7] Exemption 4 of the Freedom of Information Act provides that the disclosure requirements of the Act do not apply to matters that are:

> trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . .

5 U.S.C. § 552(b)(4).

public by the person from who it was obtained. This intention was expressed specifically in both the Senate Report and the House Report accompanying the Freedom of Information Act:

> This exception is necessary to protect the confidentiality of information which is obtained by the Government through questionnaires or other inquiries, but which would customarily not be released to the public by the person from who it was obtained.

S. Rep. No. 813, 89th Cong., 1st Sess. 9 (1965). Indeed, the companion language in the House Report was quoted by this Court in *Chrysler Corp. v. Brown*, 441 U.S. 281, 291 n.11 (1979):

> [Exemption 4] exempts such material if it would not customarily be made public by the person from who it was obtained by the Government.

H.R. Rep. No. 1497, 89th Cong. 2d Sess. 10 (1966), U.S. Cong. & Admin. News 1966, p. 2427.

Against this background of legislative intent, any objective assessment of the information at issue in this case must yield the conclusion that that information, in fact, is confidential and that it is entitled to the protection of Exemption 4. The information was not customarily made public by the business organization which provided the information. But the agency, and subsequently the court, ignored entirely the "not customarily made public" standard of the legislative history and relied instead on the test fashioned in *National Parks and Conservation Association v. Morton*, (*National Parks I*) 498 F.2d 765 (D.C. Cir. 1974). This test finds no basis in the legislative history.

The *National Parks* test emerged in an opinion in which the Court of Appeals for the District of Columbia Circuit announced that the "not customarily made public" test was not the only relevant inquiry in determining whether information is confidential for purposes of

Exemption 4. 498 F.2d at 767.[8] The court discussed various aspects of the legislative history of the FOIA and demonstrated strong support for the proposition that the legislative purpose underlying the exemption for commercial information is to *encourage* cooperation by those who are not obliged to provide information to the government and to *protect* the rights of those who must supply such information. The court concluded:

> This history firmly supports the inference that Section 552(b)(4) is intended for the benefit of persons who supply information as well as the agencies which gather it.

498 F.2d at 770. The court then adorned its discussion with a summary of a simplified test to be used to determine confidentiality under Exemption 4:

> To summarize, commercial or financial matter is "confidential" for purposes of the exemption if disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from who the information was obtained.

498 F.2d at 770 (footnote omitted). Curiously, the *National Parks* opinion is most often remembered for this shorthand test for confidentiality and not for its conclusion that the purpose of the fourth exemption is to encourage and protect the submitters of data. The opinion does not attempt to explain why this shorthand test follows logically from the legislative desire to encourage and protect submitters of information. Nor does the

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[8] Prior to *National Parks I*, the District of Columbia Circuit had repeatedly applied Exemption 4 to protect from disclosure information that customarily would not be made public by the person from whom it was obtained. See *Sterling Rug, Inc. v. FTC*, 450 F.2d 698, 709 (1971); *Grumman Aircraft Engineering Corp. v. Renegotiation Board*, 425 F.2d 578, 582 (1970).

opinion attempt to explain why this shorthand formula is more appropriate than the legislative formula ("not customarily made public") as a test that will achieve the legislative purpose to encourage and protect submitters. Indeed, the *National Parks I* opinion begins its analysis by emphasizing that an *objective* test is called for under Exemption 4, but concludes with a shorthand test which effectively requires a court to make highly *subjective* determinations about potential impairment of an agency's ability to gather information and the potential likelihood of substantial competitive harm if information is not protected.

There is nothing in the legislative history to suggest that Congress intended to impose such subjective determination on courts and agencies faced with Exemption 4 issues. Indeed, the complexity and duration of reverse-FOIA litigation such as the instant case is a result of the difficult issues produced by such a subjective test. Such proceedings could be simplified considerably—with a consequent savings in court, agency and contractor resources—if the test expressly dictated by Congress were to be applied; that is, Exemption 4 should protect information which customarily is not made public by the individual who supplied it to the government. This case provides the Court with an appropriate opportunity to clarify the application of Exemption 4.

CONCLUSION

For the reasons set forth, the Amicus Curiae Equal Employment Advisory Council supports the Petition and urges the Court to grant certiorari in this case.

Respectfully submitted,

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